Rainer Faupel*

THE RULE OF LAW

– Nothing Purely Abstract and No Matter for Sunday Speeches Only –

This text is a lecture that Rainer Faupel gavein Belgrade on 21.04.2009. Few years ago on the summit of G-8 in Berlin he also gave the lecture about the Rule of law.. In this text he talks about general definitions of the notion of the Rule of law, but also pays special attention to some social, cultural and political factors that must be fulfilled if we want to establish the Rule of law in one country. In that sense he pointed out sveral factors, such as education in professional and ethical standards, building confidence in state

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institutions, the role of free press and media, cultural changes, political support, etc.

Key words: *rule of law; national and international level; education; building confidence in state institutions; free press; cultural changes; political support*

I. Introduction

For some it might need an explanation: Why another lecture on the rule of law topic? Why repeating statements constantly made in discussions with the public, with the Government and NGOs, and repeated in countless seminars and round tables? Why dealing with a matter which, after endless repetition, might in the meantime have become an increasingly boring subject for the counterparts in States in transition or in developing countries?

The answer is very simple: There is still a terrible gap between words and practice. The essence, therefore, of my presentation is in the sub-title: First, the rule of law is much more than an abstract principle. It has most tangible flesh and bones. And if you do not see or feel the flesh and bones then you can be sure that something is wrong with the rule of law. Second, you undoubtedly hear a lot about the rule of law in Sunday speeches (or seminars and round tables), in solemn statements of politicians, or you read about it in papers of great dignity. This is not enough. If you do not experience the rule of law in day to day life, as a devoted effort of all State institutions, as common interest and common expectation, or as the normal way of life and the normal functioning of both the society and the institutions of your State, then the rule of law is just words, not practice and normality.

June 1993 was a very important day not only for the European Union but also for Serbia, even if at that time only very few will have noticed or realised that here. The European Council agreed on three core conditions to be met by States wishing in future to become an EU Member State. After the big changes in Eastern Europe, after the breakdown of the Soviet Union and the Warsaw Pact, after the independence of many new (and old) States and after their fight for democracy and rule of law, it became more and more visible that the European Union rather soon would comprise quite a number of new Member States; they all had behind them a history where these core conditions for membership had not been accepted or even had been object-

ed. Since the European Union regards itself, *inter alia,* as a community of common values it is not surprising that there is a first, so-called political criterion which reads as follows:

> Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for, and protection of, minorities.

The rule of law is, of course, also a cornerstone of the foundation treaties of the European Union, and every Member State is bound to the relevant provisions.[1]

I will not speak today about the other two criteria, namely the economic and the acquis criterion, respectively. I am just talking about this first political criterion which, in my opinion, could also be named the "rule of law criterion": protection of human rights and of minorities undoubtedly are an indispensable part of the rule of law, and, at least for Europe, it should be equally undisputable that the rule of law requires democracy and that democracy cannot work without the rule of law.

Before turning to the difficulties of establishing and implementing the rule of law in countries in transition, like in Serbia, let me underline that rule of law as a topic mainly, regrettably, for solemn declarations and Sunday speeches is not just a problem of developing countries or countries in transition. The European Union, too, in connection with recent enlargements, had to ask itself whether it had given the rule of law criterion really all the importance it should have been given. The Union and the Member States had to realise that certain new member countries had given more lip service to the rule of law issue than proper implementation; even, that certain laws regarded essential for the implementation of the rule of law have been repealed or considerably weakened after accession. Therefore, the European Union in future for sure will have to pay more attention to a really credible implementation of the rule of law, and a country wishing, like Serbia, to become a member of the European Union is well advised to take the rule of law requirement extremely serious. The European Union had to learn the lesson that words, even bills in the statute book, are not sufficient proof for the application of the rule of law. All States aspiring for EU membership will in

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[1] See, e.g., the consolidated text of the Treaty on European Union agreed upon, but not yet ratified by all Member States, in Lisbon on 13 December 2007, Articles 2, 3, 6.

the years to come be observed with much more critical eyes than the States before. At the same time one should always be aware that, given the many problems of the enlargement process in the past, there is a growing sense within the European Union that, before further enlargement takes place, a certain consolidation of the Union and internal reforms are necessary. Non-fulfilment or not sufficient fulfilment of the rule of law criterion can very easily be used as an excuse for waiting a while with accession. Therefore, Serbia, like any other country wishing to become a member state, should give the utmost priority to the rule of law issue. What, with respect to the rule of law, is laid down in the draft Stabilisation and Association Agreement[2] is essential for the rule of law, and the European Union, in the light of its most recent experiences, will have a still closer look whether the implementation consists just of words and promises or is consolidated practice within all State institutions and daily life.

For the moment, in any case, no one, not even a most sympathetic observer like me, can be satisfied with the rule of law situation in the country. I am referring not just to the EU Commission's last Progress Report[3] or to a recent Council of Europe Report on obstacles to full implementation of human rights in Serbia. If the Belgrade Centre for Human Rights deplores deterioration in the human rights situation, if even the President of the Republic of Serbia states that the future of Serbia depends on breaking links between crime, economy, justice system and politics or that the rule of law still is not achieved, then I need not quote a lot more sources. It is, to the contrary, most remarkable that again and again there are news about the involvement even of most high ranking judges in bribe and misconduct or that that one or the other among them is directly connected with criminals.

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[2] Cf. Articles 1, 2, 8, 80, 114, of the draft SAA. A more detailed list of topics essential for the rule of law is contained in the European Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC; Official Journal L 080, 19/03/2008, pp. 46-70. The EU Commissions Progress Report on, *inter alia*, Serbia of 5 November 2008 (MEMO/08/672) is not too explicit in this respect; however, there is a clear warning or reminder that there was not much progress.

[3] See footnote 2

II. Definitions and General Remarks

What is the "Rule of Law"?

I am not going to bore you with the libraries full of definitions and descriptions of the concept of "rule of law". And I am also not talking about the other libraries full of academic dispute about similarities and divergences between "rule of law", "état de droit" and "Rechtsstaat", or similar terms in other languages. This is something for academics and I am more a practitioner. As such pragmatic approach we should follow a definition used within the United Nations. This definition is far more than the old-fashioned just formal or positivistic definition: It has, by using explicit substantive criteria, left behind the old tradition of not interfering with so so-called "Internal affairs". Moreover, it has the advantage that it is not objected by anyone. The definition reads:

> The „rule of law" refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, fairness in application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[4]

You see that the definition consists of a number of fundamental substantive provisions and of provisions of a more formal character. The most important element of this definition is the idea of the supremacy of the law and of accountability to laws. This idea is deeply rooted in the European history of the age of the enlightenment and connected with the great German philosopher Immanuel Kant.

Examples for the substantive provisions of the UN definition are: first, the said supremacy of the law for all actors, public and private, in a given State; I add: supremacy of the law understood as the opposite of supremacy of power or of political and economic interest; and, of course, understood as

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[4] Cf. e.g.: The rule of law and transitional justice in conflict and post-conflict societies; Report of the Secretary General, UN Security Council, S/2004/616, no. 6

the opposite of depending from just the will of a king, any other personal ruler or a political party; second, separation of powers of government (or, what I would prefer: separation and appropriate balance of powers); third, consistency of the laws with human rights norms and standards.

These substantive requirements are so fundamental that, even if discussions in detail are possible, they cannot be questioned as requirements for the rule of law. Having in mind the definition and the underlying substantive charters and treaties you see why I regard it as a step back if some still talk about a merely positivistic definition of the rule of law; such positivistic definition would simply say, that you already had a functioning rule of law if, completely independent from its content in substance, the application of the law were just in line with the existing institutions and the laws formally agreed.

However, the UN definition in addition has a more open part where formal, even if highly important, requirements are stated: The laws, to which all actors in a State have to be accountable, are, apart from being always required to be consistent with human rights and the other substantive provisions of the definition, not substantially circumscribed; they have just to fulfil the general requirements of being publicly promulgated, equally enforced and independently adjudicated – the last two conditions (equal enforcement and independent adjudication) undoubtedly again very substantive elements extremely hard to achieve in a country in transition.

This distinction between substantive and more open elements of the definition is important because it raises the question to which extent the rule of law has a normative foundation in international law. The answer is: Whereas certain and most important general principles of the rule of law can be regarded as binding for all, there is, as far as there is no binding international law, wide room and discretion for national legislators to enact their individual body of national laws according to their own traditions and needs. We will have to live with the permanent tension between international disciplines and commitments and national policy space.

That means for national constitutions and legislations: There are many different ways how the general principles of the rule of law concept can be translated into national constitutional and legislative systems. No such system is the one and only, and there are many ways to create and apply constitutional and legal systems that are in conformity with the rule of law, even if among them there are important differences. I am stressing this point

because I do not like a certain tendency of international organisations to impose something which they regard as perfect without adapting it properly to national needs and legislative traditions.

It also means that, insofar as there is no binding international law, you can, if trying to improve rule of law principles, not just ask the given State to comply with "the law". It will ask: "Which law?" Therefore, instead of making a simple reference you will have to convince this State to change his law or to adopt new laws. You will have to convince that the law you have in mind out of such and such reasons is better than his, that there are broadly accepted principles of good governance, that there are best practices, and that there are international treaty systems which are so widely adhered to that it makes sense to join them, too.

To give just one example: The protection of intellectual property rights – presently so much in danger, but so important for authors, inventors, international trade and exchange of knowledge in a globalised world – becomes a rule of law point in the strict sense of the above definition only once the given State is a member of the Paris or Berne Conventions, of the WTO or other international instruments and if he has accepted the relevant provisions. The same is true in the field of economic law: whether and where, for instance, national treatment for foreigners in investment matters should be the law of the land is no consequence from some abstract principle of the rule of law; it is a consequence of the sovereign decision of the State to become a member of relevant treaties or to shape his law to that effect.

No "One-Size-Fits-All" Solutions; Options; Ownership

This policy space has several important consequences: (1) Apart from the fundamentals just referred to, there is no "one-size-fits-all" model. (2) Within the framework of the fundamentals there are different options. (3) What is called the "ownership" of the addressee State must be respected.

National and International Level

Improving the rule of law concept is a necessity both on the national level and the international level. I cannot go into details here. Only this: To ask a given country to follow the rule of law internally requires from the demanding State the same attitude when it comes to its own international and national actions; there are always temptations, maybe in international

relations even stronger than internally, to use power instead of abiding by the law. This raises the important point of consistency and credibility in politics, and there can be no doubt that a given State's policy for the improvement of the rule of law elsewhere is necessarily measured against its own practice. If this is doubtful, then the fight for the rule of law will be regarded as a Sunday speech or as motivated by something completely different from the rule law. Recent history is full of examples where "rule of law States" have not been taken too serious when they fought for the rule of law while some of their own actions correctly had been under massive criticism. In other words: I think that a State who internally is in accordance with rule of law principles will also on the international level follow rule of law principles and gain the necessary credibility.

Improving the Rule of Law in Different Countries

Improving the rule of law has a different meaning from State to State. It makes a difference whether you address the issue vis ŕ vis a State where the rule of law generally is accepted and established or whether you have to address it in a State where the rule of law not at all, or only in limited aspects, is the governing principle for the State's functioning. I am totally aware that the rule of law issue is an issue for all States. Balance of powers conflicts, for instance, arise everywhere. Tensions between individual rights and public security are a commonplace issue in all States, and, as mentioned before, the recent past is full of examples where even States which undoubtedly are "rule of law States" had to admit that certain practices or laws for certain circumstances have not been in conformity with the rule of law. I just quote the "enemy combatant" dispute in the USA and worldwide or the case of the Government of an EU member state which lately had to resign because the President of the Supreme Court publicly complained about attempted interference with the judicial power. Therefore, discussions on improving the rule of law concept should be conducted always bearing in mind that there is no State where the rule of law is definitely established once and forever or where it never in any way is in danger.

However, there remain big differences in the respect for the rule of law. On the one hand, the dangers are slight, or they happen within a system which in general is functioning according to the rule of law, and where there is, once necessary, an immediate and open internal debate about critical points which can lead, as we have seen, to a complete political change or to the resignation

of a Government or Ministers. On the other hand, there are States where the simplest or most fundamental principles of the rule of law are unknown, not respected or waiting for implementation, and/or States where there is no public opposition at all or an opposition which is too weak, not sufficiently supported by press and media and by the academic community or the civil society. Regardless of these big differences: Efforts to improve the rule of law in such States are better received if certain deficits even in the most developed countries are not denied but taken as an example that the establishment of the rule of law is a never ending story and that the rule of law is always and can be everywhere in danger.

III. Rule of Law and its Components

Advice in Legal Drafting

The statute book for the lawyer is the first reference point or field of action. The statute book shows to which extent rule of law principles, in general or with regard to specific fields of law, are respected, where changes are necessary, where existing laws have to be abolished and replaced or where new legislation has to be introduced. I am referring to constitutional provisions as well as to other laws. All these rules have to be tested whether they are in compliance with the general standards referred to above: (1) on the institutional and organisational level with the principles of democratic participation, of accountability to the law of all actors, of separation and balance of governmental powers, of independence of the judiciary, access to the courts and equality before the law, to quote just the most important; (2) on the more general level whether the existing rules are in conformity with the principles of human rights norms and standards and, as well, with all the other features of good governance. There can be no doubt that the countries in transition who, sometimes in extremely difficult and for the actors also dangerous efforts, have overturned the old dictatorial one-party systems, now have to change nearly everything in their systems or, at least, have to give a new meaning to the old words.

It helps a lot if this change is seen as a marked new start and that it is not hidden in a language of some "evolutionary process" or even "continuity". For what happened in Germany some 20 years ago we use the term "peaceful revolution". Luckily, it was peaceful without bloodshed; but compared with the old system, it was a real revolution, and the extremely big changes which had to be introduced on the territory of the former German Democratic Republic have only been acceptable for the people because everyone knew that a sys-

temic change had to be realised, not just some little repair or refurbishing here and there. I am far away from comparing the German situation with the situation in Eastern or South-Eastern Europe, but the fact that in some of those countries the revolutionary change and all "discontinuity" was denied has not proved to create among all politicians and the majority of the population the necessary consciousness for the fundamental changes to be made.

To come back to the statute book I cannot quote here all the many points where new legislation or the change of old legislation is necessary, how complex this is and how many legitimate (apart from all the illegitimate) disputes are to be solved. The list of rule of law points mentioned in the EU Council Decision regarding the European Partnership with Serbia is very long, might even not be complete, and it more enumerates topics than detailing the necessary step by step legislation[5]

Anyway, this remains a huge challenge, not only for analysis and drafting but even more for convincing the national actors to follow that line, to follow it expeditiously, and to overcome political difficulties or just the very common trend not to change anything or not too fast. There is a lot of help offered to this effect. Given the frequent lack of coordination among donors or given even their too often diverging reform concepts, sometimes even too much help is offered; but this is another topic.

In any case: It is clear that convincing the national actors cannot be done by experts alone. To create the willingness to come to fundamental changes needs political support inside the country, at least from the majority of the politicians and, hopefully, through demands or input from the side of citizens and the media. In this respect – creating the willingness and preparedness for change – the role of NGOs is of fundamental importance. However, in many cases internal support is not really existing or too weak. That means that such processes, as many examples show, also need high political support, sometimes even pressure, from the international community.

Help to Adequately Apply the Law

You may have noticed that I did not qualify the statute book as the only or most important field of action when trying to improve the rule of law. Equally important, and, maybe, even harder to change to the better, is the application of the law through the administration on all its levels (from min-

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[5] See above footnote 2

istries to communal authorities, from policemen to tax officers), and through the prosecution and the courts. The best laws, including, of course, the internationally accepted principles of human rights norms and standards, do not mean much, if they are not known or not understood by those who have to apply them. This is particularly true when the legal framework has undergone major changes, as is the case when the rule of law principles are more or less new for the country or observance of rule of law principles never was standard in day-to-day business.

The problems become still bigger if the general professional qualification of the civil service, of prosecutors and judges is not particularly high. I am talking about the "general professional qualification", that is the qualification of the average civil servant, judge or prosecutor. It is not enough that the "élite" among them (and I have met quite a number of excellent and brilliant people) is fine. Therefore, as important as the enactment of new laws are formation and training of the people who, in daily contact with the citizen and on a day to day basis, have to apply the laws. I know that this problem is tackled, that a reform of civil service is underway, that training centres are set up and that certain efforts are made to improve the situation. But it is not a good sign that the money needed for such purposes for a long time had to come from the budget of donor organisations, not from the national budget. Formation and training of the civil service is a genuine obligation of the State and it takes place in its own interest. Out of general political reasons it is, for instance, unacceptable that the continued existence of training centres should be dependent on donor money.

Education in Professional and Ethical Standards

Applying the law correctly, equally for all, uninfluenced through outside pressure or economic interest, be it personal or general, is far more than just knowing the law and knowing the principles of professional ethics and good conduct. The values just addressed, need – since they do not appear to be generally observed in a bad tradition of mismanagement, misconduct, corruption, lack of control and dysfunctional governance – to be implanted through educational programs. Whole attitudes have to be changed, both on top of the hierarchy and down to those working in the line. The ideal civil service has, as a whole, to have knowledge, strength, impartiality of course, and a reasoned professional self-confidence, standing and pride which should enable it to do its work properly and appropriate.

Being trained in another civil service tradition I have found it very strange to find in the former GDR too many civil servants not knowing what to do or not knowing what to propose to their superiors; they were too often waiting for directions instead of elaborating and suggesting solutions according to their expert knowledge. This was matched by superiors who erroneously thought that without their directives nothing would happen and who, completely over-estimating their own capabilities, did not have any respect for superior knowledge or expertise of civil servants working in line functions. I have made similar observations here, and if this attitude is not completely changed you will never have a civil service which knows what to do and is able to do its job properly, even if there is no superior to tell him every detail. In a good civil service most of the knowledge and expertise should be found in the line ranks of the organisation; the superiors in the hierarchy should be able to limit themselves to deciding between options normally to be developed down in the line. It is not bad, of course, if the superiors are experts, too. But expertise has, in particular, to be shown down the line and the superiors are well advised to respect that.

Therefore, applying the law correctly, fair, in an open process, without discrimination and irrespective of personal interest or what the superiors or other mighty people might expect, is the challenge. It needs self-confidence, standing and the feeling that there is trust in knowledge and performance of duties. No question that formation and training in this sense needs time and that the necessary changes of attitudes can be expected, generally speaking, more easily from the young than from the old. However, all these educational exercises in knowledge, professional standards and ethics, indispensable as they are, most probably will not yield results if not, at the same time, also a general atmosphere of lawful behaviour and good conduct is created and becomes the normal attitude of all office holders. Here again – I just mention the problem of corruption – a lot is to do and a lot of pressure internally and from the outside is necessary. Internal pressure should come from the citizens, but also from inside the professions. Pressure from the outside also is often indispensable: As long as politicians do not accept the values it is difficult to expect the civil service, the prosecutors or the judges to fully comply with these standards. This, undoubtedly, is another aspect of improving the rule of law where experts need the help of politicians and the public to generally establish the values and make them principally accepted.

Building Confidence in State Institutions and Persons Holding Offices

It is a common "feature" of States in transition that no or not much confidence in State institutions and the persons holding offices. While this lack of confidence is mentioned form time to time as a sub-item in the rule of law discussion its importance is often underestimated or, much the same: the creation of such confidence is just seen as the automatic consequence of proper laws and proper administration of the laws. This is correct in the sense that you cannot expect confidence and trust as long as the laws and its application are not in conformity with the rule of law. However, more action is necessary to help create or rebuild confidence and trust. Long lasting deficiencies often have led to such a degree of mistrust that enacting the proper legislation and have them appropriately applied will only in the very long run create a better relation between the governors and the governed.

This is a point which should be much in the focus of attention. Public rating of and public trust in politicians is not high, to say the least. Recently, I have read a Serbian commentator saying that the general public is even hating the Government. Even if this should be a rather common attitude vis ŕ vis the politicians in question it is a matter of even greater concern that there is widespread distrust in the institutions, in particular the prosecution and the judiciary, in nearly all persons holding office there and in the civil service in general. It is extremely difficult to cope with this situation, which, on the one hand, is a heritage of the past, and, on the other hand, a consequence of disappointments connected with the speed of the reform process. It is quite clear (but often overlooked in daily practice) that a national legal system, or the rule of law as such, cannot function without trust in institutions and in persons. Therefore, I was, and still am, really astonished that this point is not seen as one of the most decisive for further development. It is not enough to talk about it in general terms and to believe that individual projects here and there in sum finally will change the picture also in respect of general trust in institutions and persons. "Rebuilding trust" must be a big topic of its own, and the specific measures (legislative acts, administrative measures, staff policy etc.) must be seen as part of an overall effort. It would be of enormous help if such perception were predominant in the political "elite" or, if this were not sufficiently the case, in high level talks would be conveyed to the national interlocutors. I often have experienced that convincing my direct

counterparts was not enough, and that they have the greatest difficulty to convince the other members of the cabinet about general points like that.

Everyone knows that under the old regime freedom of universities, freedom of the press and independence of the judiciary suffered most. In my perspective, by far not enough is done to cope with the judiciary's problems. To give you one example: Whereas after the fall of the old regime Parliament, as the legislative power, has gained democratic legitimacy through elections, and Government, the executive power, has gained such democratic legitimacy through support in and dependence from Parliament, no such democratic re-start happened in the judiciary where, more or less, the old persons remain in office. In Serbia, unfortunately, there was no consistent "lustration" of officeholders like in some other countries in transition. This does not only mean that there are some in office who, because of linkages to the old system, should not be there anymore; it also means that a chance for a visible and publicly noticed re-start was terribly missed. No wonder that changes in the statute book on judicial independence so far have had so little outside effects. "Lustration" would have been a marked sign of change also in the judiciary. It would have helped to build new confidence, and it is not surprising that without such re-start the low rating of the institution and the persons has not changed or, if it changed, then to the worse. The absence of lustration, and, in my opinion, also the absence of clear reactions from the international community with regard to this political decision, is one of the clear set-back points for all endeavours to do something for the legal system and the rule of law.

Some now will say that "lustration" in this sense is in conflict with the personal independence of judges and its guarantee through lifetime appointments. Independence of judges, indeed, is a very high value. But after a systemic change to a real democracy under the rule of law, one has to ask for the democratic legitimacy of all three powers of Government, and the third power (which has a specifically important role to play for the implementation of democracy and rule of law) cannot be left out. Recruiting, electing and appointing judges and prosecutors cannot be left to the profession itself (this would mean: back to the middle-ages and its undemocratic power of professional guilds) or to councils and bodies without direct democratic legitimacy. There can be no doubt that "lustration" cannot be left to the good-will of the profession itself. Without too much going into details I can only say that in Germany, after the peaceful revolution, we were extremely

happy that the first and only really democratically elected Parliament in the former GDR immediately decided that all judges and prosecutors had to be "screened" before re-appointment. This was strongly endorsed from inside the judges and prosecutors themselves, not necessarily the associations, who knew only too well that a democratic institution could not be built up with persons who did not have the essential qualification for that or had been fierce followers of the old regime. To have had this "lustration" contributed enormously to the democratic re-start und to regain trust.

Let me add a last point already touched upon. The interest in an atmosphere of general trust and confidence in institutions and persons is not just a matter for the society and the citizens. It is equally important for the institutions and persons holding office themselves. If the citizens do not have confidence they will not accept the role and function of institutions and acting persons; and if the institutions and acting persons are generally not accepted, then they will not have the authority to fulfil their tasks in administering the country, in prosecuting crimes, or in rendering decisions in criminal or penal proceedings. Therefore, the building of confidence point should be seen as a separate and not less important sub-item of the efforts to improve the rule of law.

In fact, all efforts to bring the statute book in line with the rule of law, and to make the office holders apply the law correctly and on the basis of ethical conduct, should always, and maybe primarily, be seen as necessary pre-conditions for regaining trust. And not only should they be seen that way: All these efforts should also be broadly communicated to the public as measures to regain trust. The money for creating public awareness and for public support is very well invested. It serves not just information purposes but will have the additional effect of confidence building. If this is realised it will facilitate to raise the necessary funds for public campaigns. We all know that the rule of law point is a very strong point for speeches but immediately turns to be a weak point in cabinet deliberations or parliamentary debates once it comes to the money and to competition with other important needs.

Very general: as long as the rule of law is regarded as a soft topic or a topic more for Sunday speeches there is not much hope for improvement. It has to become a hard point in everyday business, including mobilizing the necessary funds. Resources for sustainable investment in justice have to be made available.

Balance of Power

I turn to the balance of power between the three branches of government, maybe the most delicate point for the rule of law. For countries in transition it is typical that under the old regime you had an over-powerful executive branch, and that the executive itself was the instrument of the leading political party or parties. This certainly is over. But it appears that, as far as an over-powerful executive is concerned, there are remnants of the past which have to be completely overcome if a functioning legal system in line with the rule of law is to be made functional. Nobody, outside and inside countries in transition, is in doubt about the necessities. It would be highly unfair and unjust to minimise the efforts undertaken so far. However, it would be equally wrong to believe that the changing of some laws is enough for the separation and balance of power of the branches of government. This is true for the new dependence or accountability of the executive from parliament under the law; it is equally true for the guarantee of independence for the judiciary in some new laws (which, as you know, is no completely new guarantee – just on paper you had it also under the old regime). Again, the heritage of the past is deeply rooted, and those exercising political power all have in their brains remains of experiences from the past; those bad traditions are leading them, here and there (when the temptation or a political gain is big enough), to practices which are completely incompatible with the rule of law.

I do not hesitate to quote some older and newer examples, and I am sure that all of you will have more and better examples at hand. But I will not quote the examples without mentioning that one of the greatest helps form the outside for the establishment of the rule of law would be if such examples were pin-pointed not only by some local NGOs, intellectuals or commentators, but also, and in a very detailed fashion, in political talks by the highest ranking politicians.

The examples: (1) Extremely quick and intransparent legislative processes outside the normal procedure when big interests are at stake; (2) the taking away of parliament membership from persons who have left their parties, or have lost the confidence of the majority in their party or in the ruling government coalition; and, above all, the disrespect for decisions of the constitutional court not allowing such parliamentary practices; (3) the manner in which sometimes, and independently from qualification in the profession, judges are elected or not, promoted or not, or removed; (4) the ways by which certain judges or prosecutors (I am not talking about those who have proved to be corrupt or unable to properly discharge their offices) are forced to leave office

without a legal reason or appropriate procedure; (5) the way how sometimes competences of certain judges and prosecutors are changed without their consent; (6) the way how in so-called political cases, or cases where public figures are somehow involved, expectations or even demands are most outspokenly formulated by politicians, parties or even members of the government; (7) the sometimes childish tricks how Parliament is misused not to debate the most urgent questions (e.g. the question whether or not debates should only take place once there is television broadcast); and (8) a most recent example with minor effects but great significance: no Ministry should dare to ask the courts via the Supreme Court to generally suspend certain law suits or not to execute respective decisions, and the Ministry competent for the judiciary should not have acted as "the postman" for such wishes which can only be understood as Government demands or expectations; the respect for the separation of powers should have led to the immediate refusal to forward such request. This would have been proof of a new attitude, and the public would have welcomed this as something giving hope for real changes. If the two Ministries should have cooperated in drafting such a letter to the Supreme Court – there was speculation about that in the press – it would make things even worse.

If you realise how fragile the independence of the institution and of individuals in those institutions is, you will understand why I stress that the rule of law is so much more than acceptable laws. You will understand that under those conditions it is difficult to re-build trust in the institutions and, in particular, the judiciary; and, finally, you will, I hope, understand that the absence of any immediate high level criticism from outside, apart from abstract "conditionalities" of cooperation with "The Hague", is so detrimental for progress and so regretted by someone who, on a practical level, has been trying to help the country to design provisions guaranteeing the rule of law and making misuse impossible or unacceptable for all persons having responsibilities for the well-functioning of the rule of law.

Enlightened Citizens; Free Press and Media

I have mentioned public awareness of the rule of law topic and I come back to that for some more remarks. History shows that democracy and the main features of the rule of law concept usually have made their way into the statute book from bottom to top, not from top to bottom. Enlightened citizens and free speech of individuals are necessary for the rule of law. And to have enlightened citizens, to foster their participation in the democratic process, to make them thoughtfully use their voting rights, and to establish some public

control for what politicians, the Government, in fact all institutions of the State are doing, it needs free press and media. There can be absolutely no doubt that without free press and media there is no real democracy and no real rule of law. In the same way as the three powers of government need separation, but also the proper balance among themselves, it is freedom of expression together with free press and media which balances against all three powers of government. Free press and media, therefore, are not just a goal in itself; they also are a prerequisite for the rule of law. The improvement of the rule of law must, consequently, include measures to create or stabilize free press and media.

IV. Rule of Law as a Matter of Culture and Cultural Change

I come to the end of my presentation. What I have developed so far with regard to the topic of rule of law and its many sub-items was not meant just to describe the broadness of the topic, the innumerable fields for action, the general and specific deficits in all sectors of the law and its application, or the many attitudes and behaviours to be changed. What I wanted to make visible is that the rule of law concept is much more than laws and proper application by capable, well-trained office holders of undisputable integrity. It is a matter of culture, as well. It is a matter of public awareness and it is a matter of what the whole society should have in mind as guiding principle for all State and private action. To be freely and firmly accepted by society all State authority, in decision-making in politics and administration as well as in delivering judgments through the courts, must be based on rule of law principles.

When preparing my thoughts I came across the following sentences:

> Promoting the rule of law involves …. changing culture as much as it does creating new institutions. …. Without a widely shared cultural commitment to the idea of the rule of law, courts are just buildings, judges just public employees, and constitutions just pieces of paper.[6]

I cannot put it better. To create this cultural commitment it needs every single citizen and the NGOs; it needs all State institutions as well as every politician, civil servant, prosecutor or judge; it needs the university profes-

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[6] cf. Dobbins et al., The Beginner's Guide to Nation-Building (Santa Monica, RAND Corporation, 2007), p. 88

sors as well as the teachers in school; and, finally, it needs press and media. When trying to improve the rule of law somewhere everyone should have the sentences about the necessity of a cultural change in mind. It will help always to be aware that our endeavours never should be just a technocratic exercise.

Rainer Faupel, PhD

THE RULE OF LAW

Rainer Faupel je rođen 1938 godine u Nemačkoj i nakon studija prava u Minhenu i Frankfurtu, počeo je da radi kao naučni saradnik na Univerzitetu. Jedno vreme radio je kao sudija za radne sporove, a takođe i kao funkcioner Saveznog Ministarstva pravde u Bonu. Nakon ujedinjenja Nemačke, bio je državni sekretar u Ministarstvu pravde. Od 1999. radi kao arbitar i konsultant, a bio je i u Beogradu kao šef nekoliko projekata finansiranih od strane EU, u sklopu izgradnje kapaciteta Srbije u oblasti pravosuđa. Ovaj tekst predstavlja njegovo predavanje, koje je on održao na Kolarcu u Beogradu 21.04.2009. Na istu temu, gospodin Faupel je pre nekoliko godina održao predavanje na konferenciji G-8 u Berlinu. U ovom tekstu, on govori o pojmu vladavine prava i različitim definicijama tog pojma, a posebnu pažnju posvećuje nekim socijalnim, političkim i kulturnim faktorima, koji se moraju ispuniti da bi se uopšte moglo govoriti o vladavini prava. U tom smislu, on posebno ističe pitanja obrazovanja i etičkih standarda, zatim pitanje izgradnje poverenja u državne institucije, zatim ulogu i značaj slobode štampe, zatim promene u oblasti kulture i političku podršku.

Ključne reči: *vladavina prava; obrazovanje; etički standardi; poverenje u državne institucije; sloboda štampe; promene u oblasti kulture; politička podrška.*